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No. 79-1304

In the Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 2a) is not reported. The decision of the district court (Pet. App. 3a-16a) is reported at 481 F. Supp. 4.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1979. The petition for a writ of certiorari was filed on February 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the City of New York is a "person" liable for civil penalties, pursuant to 33 U.S.C. 1321, for spilling harmful quantities of oil into navigable waters of the United States.

STATUTES INVOLVED

33 U.S.C. 1321[1] provides in pertinent part:

(a) For the purpose of this section, the term—

* * * * *

(6) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(7) "person" includes an individual, firm, corporation, association, and a partnership;

* * * * *

(b)(1) The Congress hereby declares that it is the policy of the United States that there should be no

[1]Section 1321 was first enacted as an amendment of the Federal Water Pollution Control Act by the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (formerly codified at 33 U.S.C. 1161), and was incorporated into and modified by Section 311 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 862. The Section was later modified, in ways that have no bearing on the issues of this case, by Section 57 of the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1593, and Section 1(b) of the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2467. Since enactment of the Clean Water Act of 1977, the Federal Water Pollution Control Act has commonly been referred to as "the Clean Water Act." Thus, we will refer to it as "the Clean Water Act" or "the Act." In addition, citations in this brief to specific sections of the Act will refer to those sections as they appear in the 1976 edition of the United States Code.

discharges of oil or hazardous substances into or upon the navigable waters of the United States * * *.

* * * * *

(3) The discharge of oil or hazardous substances into or upon the navigable waters of the United States * * * in harmful quantities as determined by the President under paragraph (4) of this subsection, is prohibited * * *.

* * * * *

(6) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. * * *

33 U.S.C. 1362 provides in pertinent part:

Except as otherwise specifically provided, when used in this chapter:

* * * * *

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

STATEMENT

The United States brought this action under 33 U.S.C. 1321(b)(6) to recover $1,200.00 in civil penalties assessed against the City of New York in respect of five separate discharges of harmful quantities of oil, in violation of the Clean Water Act, 33 U.S.C. 1321(b)(3).

The facts are not in dispute. The oil spills which formed the basis for the complaint occurred between July 11, 1975, and July 9, 1976. Three discharges were from onshore facilities owned and operated by the City (a municipal incinerator in the Bronx, a ferry terminal, and an unoccupied building scheduled for demolition). Two discharges were from a ferry vessel owned and operated by the City. The penalties ranged from $100.00 to $500.00 for each violation.

The City moved to dismiss the complaint, arguing that it was not an "owner" or "operator" of onshore facilities or vessels, because it was not a "person" as that term is defined in 33 U.S.C. 1321(a)(7).[2] The district court denied the City's motion to dismiss (Pet. App. 3a-16a). The court held that, in light of the plain meaning and structure of the Act, its legislative history and avowed congressional purpose, municipalities are "persons" liable for civil penalties pursuant to 33 U.S.C. 1321(b)(6) (*id.* at 5a-13a). The court of appeals affirmed on the strength of the district court's opinion (Pet. App. 2a).

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[2]The City also argued in the district court that penalties may not be assessed on a "strict liability" standard without a finding of fault. This argument was not asserted on appeal and is not raised in the petition for a writ of certiorari.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or other court of appeals, and does not otherwise warrant further review.[3]

Petitioner contends that Congress did not intend to impose on municipalities civil penalties for oil spills, and that, in its definition of "person" in 33 U.S.C. 1321(a)(7), Congress meant to exclude political entities. Both courts below disagreed with petitioner and concluded, instead, that the statutory language, legislative history, and policies of the Act demonstrate that Congress did not intend to exempt municipalities from civil penalties assessed under Section 1321(b)(6) (Pet. App. 2a, 5a-13a). More recently, the First Circuit in *United States* v. *Massachusetts Bay Transportation Authority (MBTA)*, No. 79-1512 (Feb. 4, 1980), slip op. 4, relied upon the decisions below in holding the MBTA, a political subdivision, liable for civil penalties assessed against it pursuant to Section 1321. See also *United States* v. *A/S ODDERO RADHUSGT 8*, No. 78-0762 RMT (C.D. Cal. Oct. 6, 1978) (holding that Congress intended to include cities and municipalities within the definition of "person" in 33 U.S.C. 1321).

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[3]*United States* v. *Ward*, No. 79-394 (argued Feb. 26, 1980), also concerns the oil spill penalty provision of the Clean Water Act, but the question there is unrelated to this case. *Ward* presents the question whether a proceeding to assess civil penalties pursuant to 33 U.S.C. 1321(b)(6) is a "criminal case" within the meaning of the Self Incrimination Clause of the Fifth Amendment. That question would not arise in the case of civil penalties assessed against a municipality, to which the privilege against self incrimination does not apply. See *Ward* v. *Coleman*, 598 F. 2d 1187, 1194 n.7 (10th Cir. 1979).

The conclusion reached by the courts below and concurred in by the other courts that have considered the question is consistent with the overall goal of the Act—the elimination of all discharge of pollutants into navigable waters by 1985 (33 U.S.C. 1251(a)(1))—and with the policy of the specific section in question, "* * * that there should be *no* discharges of oil or hazardous substances into or upon the navigable waters * * *." 33 U.S.C. 1321(b)(1) (emphasis added). That result is also in accord with the broad prohibition of discharges of oil or hazardous substances into navigable waters in 33 U.S.C. 1321(b)(3). There is no exception for public entities.

Petitioner does not dispute that the City of New York is a municipal corporation, but insists that the word "corporation," which is expressly included in the definition of "person" in 33 U.S.C. 1321(a)(7), does not embrace municipal corporations. This is at odds with decisions of the Court construing "person" to extend to municipal corporations. See *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 687-688 (1978); *California* v. *United States*, 320 U.S. 577, 585 (1944). As the district court noted (Pet. App. 9a), the definition of "person" in Section 1321(a)(7) does not specifically exclude municipalities. On the contrary, the use of "includes" in the definition, rather than "means," strongly suggests that the enumeration is illustrative, and that other categories, not specifically listed, were also intended to be covered. See *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941).[4]

[4]Petitioner's reliance (Pet. 10-12) on cases interpreting the Securities Exchange Act of 1934 is misplaced, since the definitional section in question in those cases, 15 U.S.C. 78c(a)(9), employs the restrictive term "means" in defining "person" for purposes of that statute.

Furthermore, the district court below (Pet. App. 9a-11a) and the First Circuit in *United States* v. *MBTA*, *supra*, slip op. 4, correctly observed that if municipalities or political subdivisions were not included in the statutory definition of persons, other portions of Section 1321 would be superfluous or internally inconsistent. For example, if municipalities are not included within the meaning of "person" for purposes of 33 U.S.C. 1321, then, as a logical matter, municipalities are not subject to the requirement of reporting oil spills, pursuant to 33 U.S.C. 1321(b)(5).[5] Thus, acceptance of petitioner's position would severely frustrate implementation of the section's "comprehensive plan attempting to expedite oil pollution cleanup and to establish a workable scheme for limiting and distributing liability." *Tug Ocean Prince, Inc.* v. *United States*, 584 F. 2d 1151, 1162 (2d Cir. 1978), cert. denied, 440 U.S. 959 (1979).

Petitioner mistakenly asserts (Pet. 16) that the Coast Guard has issued regulations that exclude states and unincorporated political subdivisions from the penalty provisions of Section 1321. The pertinent Coast Guard regulations in fact contain the same definition of "person" found in Section 1321(a)(7) of the Clean Water Act, and do not exempt either states or unincorporated political subdivisions from civil penalties. See 33 C.F.R. 153.103,

[5]33 U.S.C. 1321(b)(5) provides, in pertinent part:

> Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. * * *

153.105(a)(1).[6] We assume that petitioner based its assertion on an outdated, internal Coast Guard directive (Commandant Instruction 5922.11B, issued Oct. 10, 1974) that interpreted "person" as defined in 33 U.S.C. 1321(a)(7) to include municipal and other public corporations but to exclude states and unincorporated political subdivisions. That interpretation was canceled on March 31, 1979, and is no longer internal agency policy. An agency may abandon or modify a position at variance with the controlling statute, and, indeed, it has an obligation to change an incorrect interpretation. Thus, the earlier directive does not impair the validity of the Coast Guard's current statutory construction. See *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975); *Dixon* v. *United States*, 381 U.S. 68, 72-75 (1965). In any event, the agency at all times found that the term "person" included municipalities.

Finally, petitioner suggests (Pet. 20) that this case raises larger questions of federalism. To the contrary, this is a simple case of statutory construction with no constitutional overtones. Petitioner has never argued that the penalty provision of 33 U.S.C. 1321(b)(6) as applied to cities is constitutionally invalid or a transgression of limitations on federal power. The only question presented is whether Congress intended the civil penalty provision to apply to municipalities. Moreover, the money collected from the relatively small statutory penalties does not go into the federal Treasury, but into a revolving fund to

[6]Regulations of the Environmental Protection Agency regarding discharge of oil also incorporate the statutory definition from 33 U.S.C. 1321(a)(7) without specific exclusions or further elaboration. See 40 C.F.R. 110.1(f).

defray the costs of administration and cleaning up oil spills in situations where clean-up costs are otherwise not recoverable. See 33 U.S.C. 1321(k). The assessment of civil penalties merely distributes the costs of removing oil pollution and in no way threatens the separate and independent existence of the states and their political subdivisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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